NO. 1074
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

ALGIRD A. PETKUS
PETITIONER

V.

THE STATE OF NEW HAMPSHIRE
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

1. When a state statute requires one properly arrested for operation of a motor vehicle on a public way while under the influence of liquor to submit to the drawing of a blood sample for testing and provides that he shall be informed that his license to operate a motor vehicle

shall be revoked for ninety days for refusal to permit the drawing of the sample, does a person so arrested enjoy the right to the assistance of counsel before submitting to the drawing of the blood or refusing to allow it to be drawn?

2. In a prosecution for operating a motor vehicle on a public way while under the influence of liquor, is the defendant twice put in jeopardy when, after the state has rested, the trial judge informs the jury of the stipulation of the defendant and the state that the street upon which operation took place is a public way?

STATEMENT

Petitioner was arrested on a charge of operating a motor vehicle on a public way while under the influence of intoxicating liquor on the evening of March 1,

1968. He was requested to submit to the drawing of blood for testing, and was advised that he had a right to have a similar test by a person of his own choosing and that a refusal to submit to the drawing of the blood would result in the revocation for 90 days of his license to operate a motor vehicle. Petitioner did not request an opportunity to call his lawyer until just before the medical technician was about to take the sample. R.9. With the technician ready to proceed, the police directed that the sample be taken before petitioner conferred with counsel and explained that such a sample must be taken as soon as possible. R.10. The sample was taken and introduced in evidence against him.

Prior to trial, the prosecutor and defense attorney stipulated that the

street upon which petitioner was operating was a public way, it being an element of the offense that operation occur on a public way. The state rested before disclosing this stipulation to the jury. Petitioner's attorney then asked to approach the bench where he noted the prior agreement and stated that he wasn't sure what it was his responsibility to do at that point. (R.74; Petition 7-8). The trial judge stated that he would allow the state to reopen and himself disclosed the stipulation (Ibid). Petitioner apparently agreed it was proper for the trial judge to do so, for he stated it was "probably the fairest thing to do." (Ibid). Petitioner never moved to dismiss and never objected to the trial judge's action. The most that petitioner's counsel did, following a recess was ask

that his exception be noted to the so-called reopening and disclosure of the agreement. The trial court gave him an exception. (R. 75; Petition 8).

ARGUMENT

THE SUPREME COURT OF NEW HAMPSHIRE IN THIS CASE HAS DECIDED NO QUESTION OF SUBSTANCE NOT PREVIOUSLY DECIDED BY THIS COURT AND HAS RULED CORRECTLY ON EACH QUESTION.

I.

Petitioner's first claim is that he was denied a Constitutionally guaranteed right to counsel when he was not allowed at the last minute to defer the drawing of a blood sample until after he had consulted with counsel on the evening of his arrest. It should be noted that the petition for writ of certiorari does not disclose the stage in

the proceedings and the manner in which a Constitutional claim was raised, as required by Rule 23(f). In fact, at no time in the trial court did petitioner properly raise a Constitutional issue. At the close of the state's case, he moved for directed verdict claiming that evidence of blood test was admitted in "violation of his constitutional rights." (R.76). It was only in the New Hampshire Supreme Court that precise references to the Sixth Amendment occur. See Opinion of Supreme Court of New Hampshire, Petition 14.

The only Constitutional issue thus considered by the Supreme Court of New Hampshire was considered by this Court in Schmerber v. California, 384 U.S. 757, 16 L.Ed. 2d. 908, 86 S. Ct. 1826 (1966). Having determined that petitioner there had no right under the Fifth and

Fourteenth Amendments to refuse, and to have excluded from evidence against him, a sample of his blood withdrawn under medically sound circumstances, this Court held petitioner had no right to the assistance of counsel derived from the Sixth Amendment, prior to the taking of the sample. The present petitioner attempts to justify the assertion of a Sixth Amendment right in this case on the ground that under New Hampshire law blood may not be taken against his will, subject to the penalty of revocation of his license to operate a motor vehicle for refusal.

He then argues that because New Hampshire does not assert its right to withdraw blood as far as it Constitutionally may do so, a new Sixth Amendment right to the assistance of counsel is

Further, the necessity for speed in withdrawing a blood sample, recognized by this Court in Schmerber v. California, 384 U.S. 757, 770-1, 16 L.Ed. 2d 908, 920, 86 S. Ct. 1826, _____ (1966), would support the state's position even if the answer were otherwise in doubt. So, too, would the reasonableness of the state's legal requirement that one so arrested be informed of his right to a similar test by one of his own choosing and of the legal consequences of refusing to allow the sample to be withdrawn.

II.

Petitioner's second claim is that he was twice put in jeopardy within the meaning of the Fifth Amendment by the trial judge's announcement after the state had rested that the parties agreed that the street upon which operation took place was a

public way. Apart from a disregard of the requirements of Rule 23(f), and apart from petitioner's apparent express concurrence with the trial judge's action until some time after the announcement was made, respondent submits that it is sufficiently obvious that petitioner was not " . . . for the same offense . . . twice put in jeopardy . . . ."

Hence, respondent submits that the New Hampshire Supreme Court has decided no substantial federal question not previously determined by this Court, and submits that its conclusions are correct.

CONCLUSION

Respondent State of New Hampshire respectfully submits the petition for writ of certiorari should be denied.

Respectfully submitted,

The State of New Hampshire

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March 26, 1971